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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~1028~~ 168

STATE TAX COMMISSION OF THE STATE OF ARIZONA, *Petitioner*

v.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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## INDEX


| | Page |
|---|---|
| OPINION OF THE COURT BELOW | 1 |
| JURISDICTION | 1 |
| HOW FEDERAL QUESTION IS RAISED | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| QUESTION PRESENTED FOR REVIEW | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 5 |
| CONCLUSION | 11 |
| APPENDIX: | |
| I | A-1 |
| II | A-13 |
| III | A-14 |
| IV | A-15 |


## CITATIONS


| Cases: | Page |
|---|---|
| *Armco Steel Corp.* v. *State of Michigan*, ....Mich...., 102 N.W. 2d. 552 | 9 |
| *B. F. Goodrich* v. *State*, 38 Wash. 2d. 663, 231 P. 2d. 325, cert. denied, 342 U.S. 876 | 8 |
| *Department of Treasury* v. *Wood Preserving Corporation*, 313 U.S. 62 | 2 |
| *Field Enterprises* v. *State*, 352 U.S. 806, Affirming per curiam 47 Wash. 2d. 852, 289 P. 2d. 1010 | 8, 9 |
| *International Harvester* v. *Department of Treasury*, 322 U.S. 340 | 9 |
| *McCleod* v. *J. E. Dilworth Co.*, 322 U.S. 327 | 3, 6, 9 |

INDEX (Continued)


| | Page |
|---|---|
| *McGoldrick* v. *Berwind White Coal Mining Co.*, 309 U.S. 33 | 2, 9 |
| *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70 | 2 |
| *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 458 | 9 |
| *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 | 3, 8, 9 |
| *Robbins* v. *Shelby County*, 120 U.S. 489 | 6 |
| *Scripto Inc.* v. *Carson*, 362 U.S. 207 | 9 |
| *Western Livestock* v. *Bureau of Revenue* 303 U.S. 250 | 9 |
| Constitution, Statutes and Regulations: | |
| Arizona Revised Statutes, Sections 42-1301, et seq., *Arizona Transaction-Privilege Tax* | 2 |
| Rules of U. S. Supreme Court, Rule 19 | 2 |
| United States Code, Title 28, Section 1257 | 1 |
| United States Constitution, Article 1, Section 8, *Interstate Commerce Clause* | 2, 3, 6, 9, 10, 11 |

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No. .....

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v.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The State Tax Commission of the State of Arizona, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona, entered in the above-entitled case on March 30, 1960, rehearing denied April 19, 1960.

## OPINION OF THE COURT BELOW

The majority opinion and the dissenting opinion of the Supreme Court of the State of Arizona was filed and entered on March 30, 1960, in the above entitled case, numbered 6853 and is reported in 87 Ariz....., 350 P. 2d. 674 (Advance Pamphlet No. 4, April 29, 1960). A motion for rehearing was denied on April 19, 1960, and the mandate of the Supreme Court of Arizona to the lower court issued on April 27, 1960, which gave finality to the decision. A copy of the opinion rendered by the Arizona Supreme Court on March 30, 1960, and a copy of the denial of the Motion for Rehearing are included herein as Appendix I and II.

## JURISDICTION

Petitioner asserts jurisdiction under Title 28, Section 1257,

United States Code and Rule 19 of this Court upon the grounds that the decision of the trial court and the majority opinion of the Supreme Court of Arizona determined that the imposition of the Arizona Transaction Privilege Tax, Sections 42-1301, et seq., Arizona Revised Statutes, upon respondent for sales of personal property made in Arizona, was prohibited by Article 1, Section 8 of the Constitution of the United States, as being a burden on interstate commerce.

The following cases sustain the jurisdiction of this court:

a. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33

b. *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70

c. *Department of Treasury* v. *Wood Preserving Corporation*, 313 U.S. 62

## HOW FEDERAL QUESTION IS RAISED

Respondent, on March 28, 1957, brought suit for Transaction Privilege Taxes which it had paid under protest, pursuant to Section 42-1339 of Arizona Revised Statutes. The sole question in the lower court was whether or not respondent's sales in the State of Arizona, upon which the transaction privilege taxes were levied, were immune from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. This question was raised by respondent in the allegations of its complaint, paragraph V, and paragraph 3 of the Protest attached to said complaint. (See Appendix III). The judgment of the trial court, Maricopa County Superior Court, Phoenix, Arizona, entered December 23, 1958, was for respondent on precisely this basis, that the taxes levied were an unconstitutional burden on interstate commerce. (See Conclusion of Law No. 8 of said Judgment which is Appendix IV.) The case was appealed to the Arizona Supreme Court and the majority opinion was decided solely on the same grounds as the lower court's decision, that the tax levied upon the respondent's sales in question was an unconstitutional burden on interstate commerce. The dissenting opinion took precisely the op-

posite view, stating that Article 1, Section 8 of the United States Constitution did not bar the levy of the taxes in question because respondent had engaged in sufficient localized activities in the State of Arizona to sustain a levy of the tax.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article 1, Section 8 of the United States Constitution:

> "The Congress shall have the power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

## QUESTION PRESENTED FOR REVIEW

The precise question in this case is just how far can an out-of-state seller act beyond mere localized solicitation activities before the total picture of his localized activities constitutes a sufficient jurisdictional basis upon which the State of Arizona can levy its transaction privilege tax upon the sales involved, without such taxation being an unconstitutional burden on interstate commerce. The question which is presented, because of the fact situation involved, falls directly between the decisions of this Court in *McCleod* v. *J. E. Dilworth Co.*, 322 U.S. 327, and *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, and there is no federal or state case directly in point or closely related thereto.

## STATEMENT OF THE CASE

Respondent is a Delaware corporation engaged in the manufacture and sale of cotton gin machinery and steel buildings. Substantially, all its manufacturing activities are carried on in Texas and none in Arizona. Its home office is in Dallas, Texas and it has a branch office in Fresno, California. (A.R. 13).

Respondent has a full-time sales engineer, W. J. Simmons, who solicits all sales made by it in the State of Arizona. He either makes the sale himself or is involved in nearly every sale of respondent's products in this state. (A.R. 15, 65). He is paid on

the basis of all sales made by respondent in this state. (A.R. 65). All his orders, however, are accepted in either Fresno, California or Dallas, Texas. All credit processing is done there, and payments are made there also. All products are shipped to the customers F.O.B. Dallas. (A.R. 15). Respondent maintains a local office at the offices of Food Machinery & Chemical Corporation, Phoenix, Arizona, and here its representative meets customers, keeps files, dispenses technical assistance, and meets with and directs respondent's erector. Most of respondent's customers are aware of and make contact through this local office. (A.R. 47, 48, 50).

The respondent's erector, a Mr. May, is a full-time employee stationed in Arizona who is highly and specially trained in the operation and erection of cotton gins. He erects and assembles the cotton gins when received here, after being shipped in a knocked down condition. (A.R. 59, 68, 70). Most of his time is spent in such erection activities but he is available for and spends considerable time repairing and servicing respondent's products for its customers. Respondent's customers are aware this service exists in Arizona and make use of it. (A.R. 68, 70).

Respondent also maintains a stock of repair parts for its products at the same location where its sales engineer has his office, Food Machinery & Chemical Corporation, Phoenix, Arizona. (A.R. 14). This stock of parts is on consignment to that company and it handles all sales and collects Arizona Transaction Privilege Tax on all sales of such parts. The parts, however, belong to respondent. The fact that these repair parts are available locally is known to respondent's customers and a large number of repair parts are there sold. (A.R. 51, 52). For the right to carry such repair parts on consignment, Food Machinery makes available to respondent's sales representative the use of an office, telephone and office equipment. (A.R. 33). This arrangement is carried out in various Food Machinery & Chemical Corporation offices located in other states and thereby creates in each area so served a central-

ized location for respondent's customers to go for service of all their needs regarding respondent's products. (A.R. 33).

The audit period involved in this case was January 1, 1954, to September 30, 1956, and during this period respondent made sales to Arizona customers of $1,180,621.62 on which an Arizona Transaction Privilege Tax of 2% was paid on $442,864.48 or a total tax paid of $8,857.29. (A.R. 20). Arizona Transaction Privilege Taxes were not paid on sales of $737,757.14 made to Arizona customers. The only difference between the sales on which taxes were paid and those on which taxes were not paid was that in all cases in which respondent's customers paid to it an amount to cover the Arizona Transaction Privilege Tax in addition to the purchase price, respondent paid the taxes to petitioner. (A. R. 20). Respondent failed to remit the tax in all cases where its customers refused to pay the tax, or an additional amount to cover the tax. (A.R. 20).

On or about December 17, 1956, petitioner, by a deficiency assessment, levied on respondent for the $14,213.29 additional taxes which it claimed were due from the $737,757.14 of sales on which no tax was paid during the audit period. (A.R. 75, 76). Within the proper time, respondent applied for a hearing, protested, paid under protest, and then brought its action in the Maricopa County Superior Court, Phoenix, Arizona, to recover the tax thus paid. (A.R. 76).

## REASONS FOR GRANTING THE WRIT

Petitioner contended in all previous phases of this action and contends here that respondent in selling its products in Arizona and by doing certain other work appurtenant thereto had engaged in sufficient localized activities within this state whereby the State of Arizona could lawfully tax all sales made or work done by respondent within its limits. Respondent claimed that all its sales were sales in interstate commerce, and all the work done was incident to sales in interstate commerce, and therefore the gross

receipts from said sales or work were exempt from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. Further, respondent claims it did not engage in sufficient localized activities to remove these sales and work from the claimed exemption.

The sole question herein is whether or not respondent, by the amount of its localized activities carried on in Arizona, placed itself beyond the protection of the "Interstate Commerce Clause", Article 1, Section 8. It is readily seen, from the statement of facts, that respondent's activities are far beyond the itinerant drummer sales situation of *Robbins* v. *Shelby County*, 120 U.S. 489, or the solicitation only activities of the out-of-state seller involved in *McCleod* v. *Dilworth*, supra, wherein this court held that such solicitation activities alone did not remove sales from the protection of the "Interstate Commerce Clause". Here we have not only full time sales and technical assistance available to respondent's customers from its sales representative but there are numerous other local competitive activities which respondent has made available for its local customers. The first of these is a local office which is known to, used by customers and used as a meeting place by respondent's employees. (A.R. 47, 48). Secondly, there is located in the same building a local stock of repair parts for use in repair and service of respondent's products. (A.R. 14, 51, 52). Additionally, respondent, during the time of the audit, had one man employed as an erector and since that time has two men so employed for local work. (A.R. 59). These men are available not only for erection work, but when needed can apply their high degree of training and skill to customers repair and service problems. And they do spend a substantial amount on this work. (A.R. 68, 70). Certainly, these activities of supplying local sales and technical assistance, seeing to it that a stock of repair parts is also available locally, and having erection, repair and service personnel available locally, shows that respondent's activities go far beyond the itinerant "drummer's" activities or the activities of a local salesman merely soliciting orders.

Petitioner also strenuously urges that the total picture of respondent's activities which the customer sees is such that there is created in his mind the rightful impression that respondent, locally, can supply all competitive benefits that such a customer will receive when he deals with a local merchant. As said by Justice Udall, in his dissent to the Arizona Supreme Court's majority opinion:

> "I believe this reasoning utilizes an unwarranted premise as a basis for judgment; that in fact plaintiff's operations—hereinafter detailed—are as different from the old-style 'drummer's' modus operandi as daylight is from dark.
>
> "The proper yardstick to apply is: has plaintiff, as an out-of-state concern, by its overall operations in Arizona so localized its activities as to permit it to compete on an equal basis with local merchants? If it has then its sales are taxable in Arizona, otherwise not. Norton v. Department of Revenue (cited in mapority opinion); Hartman, State Taxation of Interstate Commerce, Dennis & Co. pp. 102, 103, 110. Furthermore, these activities, I believe, should be viewed from the position of the potential customer, i.e., can the buyer expect to receive the same service from plaintiff as he could from a local business selling cotton gins?"

Then Justice Udall examines minutely the solicitation activities, stock of repair parts, availability of erection, service and repair personnel and concludes:

> "It may well be that any one of these factors or activities taken separately would not justify Arizona imposing a tax, but it is the overall localized activities which must be considered in determining whether the facts are sufficient to predicate the tax. Norton case, supra. No two of these tax cases are the same and each must be judged upon its own peculiar facts. In my opinion the legal principles enunciated in the Norton case, and the Ensign case (75 Ariz. 220), are controlling here. Perhaps, because of the local outlet feature, the facts are stronger than in the instant case.
>
> "Nevertheless, I verily believe that plaintiff has by its over-

> all activities subjected itself to taxation in Arizona, even though it has very studiously tried to escape it. To rule otherwise is to allow plaintiff a competitive advantage and discriminate by taxation against his local competitor. The tendency of late has been for the U. S. Supreme Court to draw a finer balance between two conflicting philosophies, thereby permitting the States to force operators such as plaintiff to bear their fair share of the tax burden."

While petitioner contends such is the true factual situation involved, it must in all truth and honesty admit that the present factual situation does not present as large a scale of local operation as presented in *Norton Co.* v. *Department of Revenue*, supra, wherein Norton Co. had a complete retail branch and clerical division operating within the taxing state. Nor does it present the factual situation of *B. F. Goodrich* v. *State*, 38 Wash. 2d. 663, 231 P. 2d. 325, cert. denied, 342 U.S. 876, decided soon after the Norton decision, and relying upon it for its rule of law, wherein B. F. Goodrich had local operations consisting of large numbers of sales, clerical and administrative personnel employed within several divisions of B. F. Goodrich Co., almost all of which had local retail outlets. The B. F. Goodrich case had one very important difference, and this was that one of the types of sales taxed, Class A, Automotive, Aviation and Government Sales, concerned a sales division engaged solely in industrial sales. It had no retail outlet in the state. While treating the sales of this division separate from all other sales, still it was held taxable on the grounds that its sales, clerical and administrative office operation locally carried on in Washington, provided a sufficient nexus for the tax.

While there was no retail outlet involved in *Field Enterprises* v. *State*, 352 U.S. 806, affirming per curiam the Washington Supreme Court, in 47 Wash. 2d. 852, 289 P. 2d. 1010, still there was involved therein a large sales organization of hundreds of salesmen, which was held to be a sufficiently large localized activity upon which the court could decide that the impact of the interstate commerce clause had been overcome.

The present case, for which petitioner requests the granting of the writ of certiorari, presents a fact situation which falls between the decisions of this court in the aforementioned *McCleod* v. *Dilworth*, supra, case and the *Norton* and *Field Enterprises* cases. There is not a single federal or state decision which attempts to draw the line between these landmark cases. There is a great uncharted void of tax situations which falls squarely within this problem area. And with taxes always being a matter of prime consideration for every large operation of business, there are more and more of such businesses attempting to and succeeding in changing their mode of operations to fall within this questionable category. The importance of a decision determining rights within this void which will be applicable to all states engaged in sales taxation and which will set a uniform rule for all such states is obvious. That such a determination can only come from this Court goes without saying.

This court has in recent years followed a continuing trend of attempting to clarify taxing rights under the interstate commerce clause. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250; *McGoldrick* v. *Berwind-White Coal Mining Co.*, supra; *International Harvester* v. *Department of Treasury*, 322 U.S. 340; *Norton* v. *Department of Revenue*, supra; *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 458; *Scripto Inc.* v. *Carson*, 362 U.S. 207. The trend of these cases can be best summed up in the often used words that "interstate commerce must pay its way". Our state courts have been following this trend and as recently as April 11, 1960, the Supreme Court of Michigan in *Armco Steel Corp.* v. *State of Michigan*, .....Mich....., 102 N.W. 2d 552, allowed a similar state tax against a claim of burden on interstate commerce.

The case which petitioner presents to this court can very properly be considered a situation which should be determined in order to properly continue the trend of the above cited cases. The Interstate Commerce Clause is not an absolute bar to state taxation

of interstate sellers. This court, in the above cited cases, has held over and over again that where there are sufficient localized activities engaged in within the taxing state, by the interstate seller, the taxing state has the right to treat the business conducted just like that of a local merchant as far as taxation is concerned. In view of the factual situation involved here, where respondent has acted in Arizona to have available every localized competitive activity necessary to meet local competitors in the competition for sales, petitioner feels it right and proper that a determination should be made that the respondent cannot use the Interstate Commerce Clause to shield itself from state taxation. Since respondent acts in every factual manner just like a local business, it is therefore constitutionally proper that the State of Arizona should be able to tax that operation on an equal basis with the local competition which it has so successfully imitated.

## CONCLUSION

Petitioner's writ of certiorari should be granted because there is presently a great void in our law regarding the right to the protection from state taxation by reason of the Interstate Commerce Clause, where an interstate seller goes beyond mere solicitation activities in the taxing state, but does not go as far as to channel its business through a large local retail outlet or a large sales and administrative division. A determination of this situation is necessary for the interest and protection of the several states and businessmen engaged in local and interstate commerce. A granting of this writ and determination of this question by this Court is the only way this can be accomplished and, therefore, its importance cannot be over-emphasized.

Respectfully submitted,

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